Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. ——————

—————— 76-1247

GEORGE BLAIR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Court should not allow to stand a conviction tainted with evidence where a defendant is lulled into incriminating himself 'by deed' as a result of governmental misconduct in arranging to secretly meet with said defendant, without the knowledge of his attorney, wherein said defendant appears in expectation of leniency and makes certain incriminating statements, which are prejudicial to *all* defendants involved in the prosecution.	13

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The defendant Blair did not and could not have effective assistance of counsel in pretrial and trial proceedings where two (2) attorneys represented the interests of all 32 defendants charged in a sixteen count indictment with both substantive and conspiracy counts, as Blair was deemed by the government to be a subordinate figure in the case, Blair paid no attorney fees, and during the pendency of the cause, it was unveiled that Blair engaged in a secret meeting with government officials in an effort to secure immunity from prosecution for himself, unknown to the other defendants, or the attorneys. 15

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. ————

GEORGE BLAIR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause February 2, 1977.

CITATIONS OF OPINIONS BELOW

The opinion of the District Court finding Petitioner Guilty and sentencing him to serve 15 years concurrently on Counts 1, 3, 4, 6, 7, 8, 9, 10, 11 and 12; 2½ years concurrently on Counts 13, 14, 15 and 16, but consecutive to the 15 year sentence; plus $5,000.00 committed fine on each Count. The decision of the Court of Appeals affirming said conviction. The Order of the Court of Appeals denying a Petition for Rehearing En Banc February 2, 1977.

JURISDICTION

The final Order of the Court of Appeals was entered February 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

STATEMENT OF QUESTIONS INVOLVED

1. Where the acts of the government, in an effort to firm up the proofs of its case against all of a group of defendants, results in a direct or indirect alienation of the marriage of one of a group of defendants, and a subsequent divorce, should the Court uphold a conviction wherein evidence garnered by such government action is employed after the defendants have been formerly charged?

2. Where an accused is lulled into incriminating himself "by deed" as a result of governmental misconduct in arranging to secretly meet with said defendant without the knowledge of his attorney, wherein said defendant appears in expectation of leniency and makes certain incriminating statements, which are prejudicial to all defendants involved in the prosecution, should the Court allow a conviction tainted with such evidence to stand?

3. Whether appellant BLAIR had the effective assistance of counsel in pretrial and trial proceedings where two (2) attorneys represented the interest of all (32) defendants charged in a sixteen Count indictment with both conspiracy and substantive charges, BLAIR was deemed by the government a subordinate figure in the case, BLAIR paid no attorney fees, and during the pendency of the cause, it was unveiled that BLAIR engaged in a secret meeting with government officials in an effort to secure immunity for himself, unknown to the other defendants, or the attorneys?

STATEMENT OF RELEVANT FACTS

Appellant BLAIR adopts by reference, as if here fully restated herein, all of the facts related in the briefs of Milton R. Henry, Esq., of S. Allen Early, Esq., and of James K. O'Malley, Esq. and does adopt said related facts as being true, correct and the facts he would allege as relevant on the same issues.

ADDITIONAL RELEVANT FACTS

After his conviction, but before sentencing, appellant retained the services of Wilfred C. Rice to appear with him at sentencing and post conviction proceedings.

BLAIR was found guilty by the Court July 23, 1974 of Counts 1, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the Indictment. At the time said defendant was found guilty, the Court was advised that a Motion for New Trial was being filed.

A Motion to extend the time to file a Motion for New Trial was filed due to the unavailability of the transcripts of proceedings by BLAIR'S APPELLATE counsel. At the hearing of said Motion, the Court advised counsel to dispense with filing a supporting brief with the Motion. Said Motion was filed, heard and denied by the Court September 11, 1974. (See App. Exh. A and B).

In support of the Motion for New Trial, BLAIR filed three Affidavits, the substance of which are as follows: (For complete Affidavits, see Exh. C, D and F)

GEORGE BLAIR

BLAIR claimed that Government Counsel Atlee Wampler and S/A Ronald Garibotto, motivated by racial prejudice, alienated his marriage and harmonious relationship with his wife, Carol Ann Blair.[1]

BLAIR said he started living common law with Ruth Ann in June 1970, and that they always held themselves out to others as being husband and wife; that they lived under the belief that common law marriages were valid in Michigan, and traveled together in states wherein common law marriages are valid, until they discovered that common law marriages were no longer valid in Michigan; whereupon, their marriage was formalized December 23, 1971.

BLAIR said that S/A Garibotto and IRS Agents engineered his incarceration as a parole violator by the State of Michigan, as an act of revenge shortly following his arrest December 15, 1971.

BLAIR said that during his short period of incarceration at the state prison, he and his wife were getting along well and she visited him at every opportunity. Moreover, she personally secured an attorney to win his freedom, first on bond, and subsequently of the charges for which he was being held.

Shortly after his release from prison, S/A Garibotto and another unknown Agent visited his home. BLAIR was not at home, upon their arrival, and they waited for him. When BLAIR arrived home, the officers followed him inside. Garibotto offered him money for a lifetime and a

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[1] George Blair is a black man and his ex-wife, Ruth Ann Burt is a white woman, having had a child out of wedlock before meeting Blair. Ruth Ann and Carol Ann Blair are one and the same person.

passport to another country in exchange for his cooperation. Garibotto became angry when BLAIR denied knowing anything.

Out of love for BLAIR, Ruth Ann yielded to Garibotto's several, additional subsequent advances, when Garibotto convinced her that BLAIR would be imprisoned unless someone cooperated with the government.

Government Counsel Wampler and S/A Garibotto secured a motel room at the Ramada Inn and arranged a secret meeting with Ruth Ann and GEORGE BLAIR, without first seeking permission to do so with BLAIR'S attorneys and unknown to the other defendants. Nothing constructive was accomplished at said meeting and BLAIR and Ruth Ann departed without the promise of the sought for immunity for BLAIR.

Garibotto continued to pressure Ruth Ann, promising her large sums of money, and finally coerced her to leave home, before she could make plans for the welfare of her minor child, whom she left in the care of BLAIR.

Several days after Ruth Ann left home, Garibotto phoned BLAIR and advised that he (Garibotto) was coming to BLAIR'S home to pick up Ruth Ann's clothes. Garibotto and about seven (7) other Agents entered BLAIR'S home without a warrant and defied BLAIR to interfere with Ruth Ann leaving with her clothing and the minor child.

Through Garibotto, the government furnished Ruth Ann money and coerced her to file for a divorce from BLAIR, which she did, although there were no grounds for divorce and she and BLAIR were completely compatible; that on one occasion, Ruth Ann phoned BLAIR from Anchorage, Alaska and then, from Washington, Michigan and pleaded with him to contest the divorce, so that

it would not become final and was concerned about whether he was seeing another woman in her absence.

BLAIR noted that out of all of the other defendants charged, his wife was the only one approached and dominated as was his.

The Affidavits of Launa Maikowski and Wilfred C. Rice, in part, corroborated the allegations of BLAIR. (See Exh. D and E).

The Court denied BLAIR'S Motion for New Trial, without investigation or evidentiary hearing. In its answer to BLAIR'S Motion, the government does not specifically deny any of the above allegations, other than that Ruth Ann said she initiated the meetings with government officials (id at 2 of Government's Memo in Opposition) (See also, Exhibit F).

Thereafter, BLAIR was sentenced to 15 years concurrently on Counts 1, 3, 4, 6, 7, 8, 9, 10, 11 and 12; and 2½ years concurrently on Counts 13, 14, 15 and 16, plus $5,000.00 committed fines on each count. Appeal bond was fixed at $100,000. cash or surety.

BLAIR takes a General Appeal of all issues to be raised.

ARGUMENTS

Pursuant to authority contained in Rule 28 (i) of the Federal Rules of Appellate Procedure, Appellant BLAIR hereby adopts by reference, as if here fully restated, all of the arguments, grounds and law espoused by each and every other defendant-appellant herein concerned.

I.

THE COURT SHOULD NOT UPHOLD A CONVICTION WHERE THE ACTS OF GOVERNMENT OFFICIALS, IN AN EFFORT TO FIRM UP THE PROOF OF ITS CASE AGAINST ALL OF A GROUP OF DEFENDANTS, RESULTS IN A DIRECT OR INDIRECT ALIENATION OF THE MARRIAGE OF ONE OF SAID DEFENDANTS, AND A SUBSEQUENT DIVORCE, WHEREIN THE EVIDENCE GARNERED AND USED TO SUPPORT SAID CONVICTION IS ATTRIBUTABLE TO SUCH GOVERNMENTAL ACTION.

The institution of marriage has been set apart as sacred in our way of life. Our forefathers, in framing the Federal Constitution, saw fit to remember therein the sanctity of marriage as being an inalienable right guaranteed to every citizen of the United States. *Bolling* v. *Sharpe,* App. D.C. 347 U.S. 497, 74 S.Ct. 693, 98 L. Ed. 884; 16A C.J.S. 604, Sec. 574. Neither the state nor federal government may deprive any person of life or liberty, except by due process of law. *Cantwell* v. *State of Connecticut,* 310 U.S. 296, 60 S. Ct. 900, L. Ed. 1213; *Cafeteria and Restaurant Workers Union, Local 473 AFL-CIO* v. *McElroy,* 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230.

It has been held that the state is a party at interest to the marriage contract or status, together with the husband and wife. *Williams* v. *State of North Carolina,* 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, rehearing denied 325 U.S. 895, 65 S. Ct. 1560, 89 L. Ed. 2006. The relationship is one in which the state is deeply concerned, and over which the state exercises a jealous and exclusive dominion. *Stevens* v. *United States,* 146 F.2d 120. Marriage is *favored* by the law, and the *public policy* is to *foster* and *protect* marriage, to make it a *permanent* and public institution, to *encourage* the parties to live together, and to *prevent separation. Luis* v. *Cavin,* 198 P. 2d 563; *Madewell* v. *United States,* 84 F. Supp. 329.

In the case at bar, appellant BLAIR unequivocally accuses the government, through its officials, of having alienated his wife's affections for him and ultimately destroying his marriage. If such were the case, said conduct would clearly be in derrogation of the law heretofore, herein cited.

We observe that not once does the government deny BLAIR'S sworn allegations. In its reply, the government simply responds that BLAIR'S wife said she initiated the meetings with government officials. Of course, this does not deny BLAIR'S charges of misconduct on the part of government officials. Moreover, the learned trial judge merely discounted BLAIR'S allegations as being without merit, without investigating same or conducting an evidentiary hearing thereon. This we contend was clear error, necessitating a new trial and/or an evidentiary hearing.

In view of the undisputed, known facts, the Court could not properly, sua sponte, discharge BLAIR'S allegations as being unmeritorius, because said allegations were supported or corroborated by the affidavits of two (2) independent witnesses having personal knowledge, e.g., Launa Mai Kowski and Wilfred C. Rice. Moreover, mere com-

mon sense and logic rest as a pillow of support for BLAIR'S charges.

It is undisputed that BLAIR and Ruth Ann had lived together common law for a considerable period of time. BLAIR was first arrested on the within charges December 15, 1971. Eight days later (December 23, 1971), he and Ruth Ann formalized their marriage while the case was pending. When BLAIR was sent to State Prison as a parole violator, Ruth Ann retained an attorney to represent him (BLAIR) and visited him at the prison every opportunity. It was not until she realized that BLAIR'S freedom was truly in jeopardy that she decided to cooperate with Government Officials in an effort to secure *immunity for BLAIR*, not herself, as she was not charged. Moreover, when Ruth Ann left home, she left her child by another relationship, in BLAIR'S custody, and made several phone calls, while in the government's employ, pleading with BLAIR to take steps to block the divorce proceedings she had started. Obviously, she had no independent desire or intent to separate from BLAIR.

It is obvious that Government Officials intended to and did break up this marriage for the sole purpose of aiding their case. It is likewise clear that the government furnished the funds with which Ruth Ann obtained a divorce from BLAIR. It goes without saying that, any evidence garnered as a result of this reprehensible intrusion into the privacy of BLAIR'S life should not be harbored by the Court as a deed meriting honor. Such evidence is tainted with the aroma of illegality, unworthy of flowing through the air of our Courts of justice, or to permeate the pages of our legal scrolls.

In *Upshaw* v. *United States,* 448 F. 2d 1218, id at 1222, the Fifth Circuit Court of Appeals said:

> "The Judicial System cannot be a party to the use of tainted evidence."

Discussing *Elkins* v. *U.S.,* 364 U.S. 206, 217, 80 S. Ct. 143 1444, the Court in *Upshaw* theorized that *suppression* of tainted evidence was the most effective way employable by Courts to command respect for the law by government officials.

In *Mooney* v. *Holohan,* 294 U.S. 103, the United States Supreme Court theorized that in order for the judicial system to command respect, the Courts must be beyond reproach. In summary, the Court concluded that, Courts must not only be concerned with justice, but that, the appearance of justice must likewise prevail.

A. Acts of Federal Agents in breaking up defendant's marriage, encouraging wife to divorce defendant, and subsequent employment of the former wife as a government witness, were in violation of public policy in favor of marriage. *Hawkins* v. *U.S.,* 358 U.S. 74, 3 L. Ed. 2d 125, 79 S. Ct. 136. The only question involved on this point is whether the parties were married. The test of a valid marriage is not whether the parties believe they are married, but whether, in law, they are legally married, *U.S.* v. *Leavis,* 363 F. Supp. 614 D.C. Pa. Since Michigan has abolished the common law marriage, the fact that the parties held themselves out as man and wife before actually getting married has no effect.

In furtherance of the public policy in favor of marriage, some sanction should be imposed on the government for the acts of its agents in breaking up the marriage, since the defendant does not have a remedy in civil law for alienation of affections (M.C.L. 551.301, MSA 25.191 abolished cause of action for alienation of affections) and even if there happens to be criminal statute that punishes

the agents for this misconduct, defendant submits it will not be employed. Hence, the only sanctions available, that will deter this sort of misconduct, is for the Courts either to bar prosecution or prohibit the evidence from being used.

B. Act of agent in breaking up marriage was barred by public policy in favor of marriage.

Besides the public policy in favor of marriage, an argument, it is submitted that the rule prohibiting one spouse from testifying against the other without the consent of the former could be circumvented successfully merely by the same kind of action on behalf of the government agents, whenever they felt the testimony of a spouse was needed. The rule that federal courts hold, that one spouse could not testify against another without consent, is still good law, *Hawkins* v. *U.S.*, 358 U.S. 74, 3 Led. 2d 125; 79 S. Ct. 136. However, it is submitted that if the sanction of reversal is not employed in situations where government agents entice a spouse to secure a divorce, the rule will become a nullity.

C. Acts of agent in breaking up marriage constituted a violation of right to counsel.

A third argument against the condoning of the acts in breaking up the marriage can be based upon the right to counsel provision of the 6th Amendment.

The Sixth Amendment prohibits the government from obtaining any statements from the accused after criminal proceedings have been started without counsel being present, *Massiah* v. *U.S.*, 377 U.S. 120, Led. 2d —— S.C. —— 1963.

In fact, after counsel has been requested, government agents may not contact the defendant even if he is given a second warning of his right to counsel, since the repeat of

the cautions cannot act as a substitute for competent counsel, *U.S.* v. *Slaughter,* 366 F. 2d 833 (C.C.A. 4, 1966); *U.S. ex rel Daley* v. *Yeager,* 415 F. 2d 779 C.C.A. 3, 1969.

Since the Sixth Amendment right to counsel provision prohibits the government from directly contacting the defendant, it is submitted that the government may not employ the indirect method of enticing the wife to relate to the agents what her husband has told her concerning the prosecution. Indeed, by use of the wife in the manner employed herein, the U.S. Attorney will obtain not only what the defendant has told his or her spouse about being implicated in the crime, but also information concerning what the defendant's attorney has related to him concerning defense strategy, unless one takes the absurd position that a spouse would not discuss a criminal prosecution involving one of them and the advice that an attorney has given. It has been held that the surreptitious invasion of the legal staff of the defendant to learn defense strategy and obtain evidence by the employment of a paid informer as a putative co-defendant, would warrant reversal, *U.S.* v. *Resko,* 401 F. 2d 965 (C.C.A. 3, 1972) or the monitoring of conversation between defendant and counsel, *Black* v. *U.S.,* 385 U.S. 26, 17 Led. 2d 26, 87 S. Ct. 190 (1966), on grounds of violation of the Sixth Amendment's right to counsel provision, since the effect of the acts of the government was to learn about communications between the accused and counsel. It is submitted that the same rationale applies here, since the government has just as effectively penetrated the wall of secrecy that surrounds the communications between counsel and the accused, by the method of using the spouse's recollection of what she has been told about the accusations by the defendant and what advice counsel has given.

II.

THE COURT SHOULD NOT ALLOW TO STAND A CONVICTION TAINTED WITH EVIDENCE WHERE A DEFENDANT IS LULLED INTO INCRIMINATING HIMSELF 'BY DEED' AS A RESULT OF GOVERNMENTAL MISCONDUCT IN ARRANGING TO SECRETLY MEET WITH SAID DEFENDANT, WITHOUT THE KNOWLEDGE OF HIS ATTORNEY, WHEREIN SAID DEFENDANT APPEARS IN EXPECTATION OF LENIENCY AND MAKES CERTAIN INCRIMINATING STATEMENTS, WHICH ARE PREJUDICIAL TO ALL DEFENDANTS INVOLVED IN THE PROSECUTION.

In the instant case, it is undisputed that government officials in charge of the prosecution met secretly with the defendant BLAIR and his wife, Ruth Ann, for the purpose of discussing cooperation by the defendant BLAIR and Ruth Ann in exchange for immunity from prosecution. (T. 1477-1479). Defense lawyers and the other defendants were totally unaware of said meeting.

Obviously, BLAIR intended to camouflage his participation and obtain immunity from prosecution through his wife's cooperation. (T. 1493-1945). When this effort failed, the meeting was terminated without a promise of immunity for BLAIR, because of his desire to keep his participation anonymous by not testifying. However, the meeting lasted an hour, within the confines of the Ramada Inn, a Motel room secured by government officials, and BLAIR actively participated in the conversation. (T. 1483)

To learn that government counsel Wample would violate the Code of Professional Ethics by stooping to such antics in his zeal to obtain a conviction is regrettable. However,

to learn that the learned trial judge would convict defendant in face of such proofs is most shocking.

We equate the actions of BLAIR in appearing at said meeting and participating therein, 'with self incrimination.' Would BLAIR attend such a meeting if he was innocent? An innocent person needs no immunity. The very fact that he was there seeking immunity from prosecution was an acknowledgment of guilt, for actions speak louder than words. Moreover, BLAIR and all the other defendants were dared to have a jury trial once the facts of this meeting became a part of the evidence.

In *People* v. *Pena,* 383 Mich. 402, the prosecutor wrote an intimidating letter to defendant's alibi witnesses reminding them of the perjury statute. In reversing the defendant's conviction, the Court said, id at 406:

> "The constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation. The manner of testifying is often more persuasive than the testimony itself.
>
> "A prosecutor may impeach a witness in court but he may not intimidate him — in or out of court."
>
> (See also, *People* v. *Rolston,* 31 Mich. App. 200, 187 N.W. 2d 454 (1971)); *Johnson* v. *State,* 188 S.E. 2d 416 (1972)).

Finally, BLAIR'S appearance at the meeting may be construed as a confession of guilt. It cannot be deemed that the trial judge would treat BLAIR'S conduct any different than a jury. Moreover, all of the other defendants' right to a fair trial was impaired by BLAIR'S conduct.

> See Dissenting Opinion in *Delli Paoli* v. *United States,* 352 U.S. 232, 1 L. Ed 2d 278, 77 S. Ct. 294.

For the reasons heretofore assigned, the convictions in this cause should be revesrsed.

III.

THE DEFENDANT BLAIR DID NOT AND COULD NOT HAVE EFFECTIVE ASSISTANCE OF COUNSEL IN PRETRIAL AND TRIAL PROCEEDINGS WHERE TWO (2) ATTORNEYS REPRESENTED THE INTERESTS OF ALL 32 DEFENDANTS CHARGED IN A SIXTEEN COUNT INDICTMENT WITH BOTH SUBSTANTIVE AND CONSPIRACY COUNTS, AS BLAIR WAS DEEMED BY THE GOVERNMENT TO BE A SUBORDINATE FIGURE IN THE CASE, BLAIR PAID NO ATTORNEY FEES, AND DURING THE PENDENCY OF THE CAUSE, IT WAS UNVEILED THAT BLAIR ENGAGED IN A SECRET MEETING WITH GOVERNMENT OFFICIALS IN AN EFFORT TO SECURE IMMUNITY FROM PROSECUTION FOR HIMSELF, UNKNOWN TO THE OTHER DEFENDANTS, OR THE ATTORNEYS.

As pointed out in Appellant Hurt's brief, Attorneys Milton R. Henry and Henry Rothblatt are two of the nation's most capable, experienced lawyers. As a matter of fact, Mr. Henry is the personal attorney of the writer. As capable as both of these gentlemen are, one would have to question even their ability to represent more than twenty individual interests in a case of this magnitude assigned to two (2) separate judges, especially BLAIR'S.

It is clear from the caption of the case, through and including sentencing, that the government deemed Eddie Jackson to be the 'kingpin' or 'boss' in this alleged conspirary. In his Affidavit, BLAIR says he paid no attorney fee to any of the lawyers handling the pretrial and trial

proceedings. Moreover, BLAIR says that once his attempt to seek immunity for himself was unveiled, all of the other defendants became hostile toward him and the lawyers discontinued notifying him of Court dates. We do not claim that his allegations are true; however, it is to be noticed that BLAIR was late for at least two proceedings, but appeared in Court each time when he says he became aware of said proceedings. Obviously, he had no intentions of jumping bond, because he did in fact appear.

When the trial of this cause started, BLAIR was several days late appearing, because he said that he was unaware of the scheduled date. BLAIR was entitled to a severance of his trial from the other defendants. However, upon the advice of counsel, who were already several days in trial, he agreed to join into the trial after having missed several days of proceedings. Regardless of the advice of counsel, the Court had a duty to sever BLAIR'S trial. (See *United States* v. *Reynolds,* 489 F. 2d 4 (CA 6, 1973) where this court ruled that an improper joinder of substantive and conspiracy counts merited a severance.)

BLAIR submitted to the Court very substantial allegations suggesting that he did not have the effective assistance of counsel. The learned trial judge could not summarily discount his claim as being without merit, without, at the least, conducting an evidentiary hearing.

In *People* v. *Teague,* 242 N.E. 2d 203, where the defendant merely *claimed* that his counsel did not competently represent him, the Illinois Supreme Court held that he was entitled to an evidentiary hearing on his petition.

Once the individual defendants became hostile toward BLAIR due to his collaboration with the prosecution, it would be most difficult, if not impossible for counsel representing all of these separate interests to remain 100% loyal to each. Moreover, BLAIR'S opportunity to discuss

privately with his own individual attorney the pros and cons of his desire to work for the government in exchange for immunity, could very well have resulted in his conviction, because it is clear from the facts of the Ramada Inn meeting that the government was willing to give him immunity in exchange for his *personal* cooperation. This offer, he could not discuss with counsel representing all of the defendants, because it would be them (the other defendants) who he would be working against.

In the end, BLAIR showed his dissatisfaction by retaining separate counsel between the trial and sentencing.

A. Defendant was denied the effective assistance of counsel, since he was represented by the same counsel as his boss.

When the Court became aware of the possibility of a conflict of interest, arising from the representation of multi-defendants by the same counsel, a duty is reposed upon the Court to take action to preserve the accused's right to effective counsel, *Glasser* v. *U.S.*, 315 U.S. 60, 62 S. Ct. 457 86 Led. 680 (1942).

The question of whether counsel is retained or appointed by the Court is immaterial in determining the existence of a conflict of interest. On the issue of waiver, every reasonable presumption against waiver will be indulged in, and the accused need not show the amount of prejudice incurred by dual representation, *Craig* v. *U.S.*, 217 F. 2d 355, C.C.A. 6, 1954.

In *Campbell* v. *U.S.*, 352 F. 2d 379, C.C.A. D.C. it was ruled that the trial judge must ascertain from the defendant whether the choice of joint representation was an informed decision. Under *Campbell, supra,* judge must inform the defendant of the dangers of joint representation.

In *Day* v. *U.S.*, 357 F. 2d 907 (C.C.A. 7, 1966), the Court held that the record of waiver should be commensu-

rate with the existing circumstances and be sufficient enough to demonstrate that an intelligent choice was made.

In *Toller* v. *U.S.* 376 F. 2d 243 (C.C.A. D.C., 1967), it was held that unless the record discloses that co-defendants have made an intelligent decision to be represented by the same counsel, the reviewing Court will be required to assume that the waiver was not a result of an intelligent choice not to have separate counsel.

In *U.S.* v. *Youfse,* 419 F. 2d 1340 (C.C.A. 9, 1969), the Court stated that a single attorney may not represent several defendants if a conflict of interest exists among the defendants.

In *U.S. ex rel. Hart* v. *Davenport,* 478 F. 2d 203 (C.C.A. 3, 1973), the Court held that petitioner was denied the effective assistance of counsel, where a single attorney hired by a co-defendant, who was the boss, represented all the defendants. The Court found that a single attorney cannot effectively represent several defendants in a situation wherein the facts disclose one defendant to be boss, and the boss has paid the attorney. The conflict in this factual situation was obvious to the Court, since counsel's loyalty would be to the master, who paid him, even if the other defendants had to be sacrificed. The Court further held that the warnings of the hazards of multiple representation by the trial Court should come at the earliest possible stage of the criminal proceedings, and each defendant must be made aware of the fact that he may obtain immunity or lenient treatment should he become a prosecution witness.

In *Holland* v. *Bates,* 225 F. Supp. 863, D.C.N.D. W. Va. 1967, the Court held that where both the Court and prosecution had full knowledge of a factual situation that disclosed a conflict of interest in dual representation, the

prosecution would be barred from denying petitioner's claim of ineffective counsel, because of the conflict.

In *Cavoallaro* v. *U.S.*, 359 F. Supp. 1276 (D.C.D. Conn. 1973), it was ruled that in multi-defendant situations the issue is not whether the attorney acted improperly, but whether a factual basis exists for doubting whether the accused had "effective and impartial" assistance of counsel.

In the instant case, it is apparent that the factual situation discloses an obvious conflict of interest, since there was a "boss" and many minor defendants, including this one. Thus, unless the defendant was warned of all the hazards of multirepresentation, and the possibility of securing immunity or lenient treatment, by the Court, it must be held that the defendants' representation was not adequate and a question of waiver does not exist.

Chapman v. *California,* 386 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969)
Tarry Buffalo Chuff v. *State of South Dakota,* 425 F. 2d 271 (CA 8, 1970)

RELIEF SOUGHT

WHEREFORE, Appellant BLAIR, prays that this Honorable Court will, after considering all of the issues assigned in the Petitions of Milton R. Henry, of S. Allen Early, of James K. O'Malley and of Wilfred C. Rice, Attorneys, grant Cretiorari to review petitioner's conviction in this cause.

Respectfully submitted,

WILFRED C. RICE, ESQ.
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2436 Guardian Building
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965-7962 (Area Code 313)

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Action No. 46597

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDDIE JACKSON, et al.,

Defendants.

Criminal Action No. 46598

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIE LEE KILPATRICK, et al.,

Defendants.

MEMORANDUM OPINION

Defendants have filed their motions for a new trial and to vacate their convictions. They have been found guilty of either conspiracy to manufacture and distribute narcotics in violation of 21 U.S.C. § 841 (a) (1) or substantive violations of 21 U.S.C. § 841 (a) (1) and 18 U.S.C. § 2 or both, as is set forth in the prior findings and conclusions

of this court. By stipulation, the motions have been submitted on briefs and oral arguments waived.

Defendants Eddie Jackson, George Blair, Joseph Weaver, James Weaver, Alphonzo Jones, Courtney Brown and Leo Hurt[1] also move specially to vacate their convictions. They contend that the disclosure of the evidence derived from a government wiretap to the grand jury without having first furnished copies to defendants of the wiretap interception orders and applications involved in their cases violated 18 U.S.C. § 2518 (9). Defendants say that this disclosure to the grand jury was prohibited by 18 U.S.C. § 2515 due to the violation of § 2518 (9) and they therefore claim that the grand jury indictments are void.

We proceed first to the discussion of the latter motion. The court observes that there may well be a late filing. Rule 12 (b) (2), Federal Rules of Criminal Procedure, 18 U.S.C., provides in part:

> "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial . . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver."

Moore lists the issue here, "irregularities in the grand jury proceedings such as the use of illegal or incompetent evidence by the grand jury",[2] as one of the defenses or objections that must be raised before trial. This is sup-

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[1] Leo Hurt, though not named in this motion, is considered by the court to be included as he was excluded from Miscellaneous Case No. 71-213, the basis for this motion, only due to typographical error.

[2] 8 J. Moore, Federal Practice ¶ 12.03[3] at 12-13 (2d ed. 1974).

ported by cases construing this rule. *United States* v. *Garnes,* 156 F.Supp. 467, 470 (S.D.N.Y. 1957), *aff'd,* 258 F.2d 530 (2d Cir. 1958), *cert. denied,* 359 U.S. 937 (1959); *United States* v. *Wilson,* 434 F.2d 494, 496 (D.C. Cir. 1970).

The reason for this rule is self evident. Motions such as this are to be made before trial so that trial may be avoided if the motion is granted and also, in some instances, to permit an appeal by the government. The failure to submit such motions results in a waiver. Nevertheless, although no showing of justification for the late filing has been made, rather than to dispose of the motion on this basis, the court will consider the merits of the claim.

On the merits, the initial issue is whether disclosure to the grand jury in these cases is subject to the requirements of 18 U.S.C. § 2518 (9) which provides in part:

> "The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved."

The court concludes that it is not.

Section 2518 (9) permits disclosure of the contents of intercepted communications in "any trial, hearing, or other proceeding in a Federal or State court", only when parties to the proceeding have been furnished with copies of the application and order ten days before its use. A grand jury proceeding, however, is not included in the restrictive perimeter of the section. The legislative history of the act sustains this conclusion:

> " 'Proceeding' is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing." Senate Report No. 1097, U.S. Code Cong. & Admin. News at 2195 (1968).

"This language would indicate that the framers of this statute considered a grand jury as something other than a 'proceeding' in court." *United States* v. *Lanza,* 341 F. Supp. 405, 421 (M.D. Fla. 1972); *United States* v. *Friedland,* 444 F.2d 710 (1st Cir. 1971).

Title 18 U.S.C. § 2515 does prohibit disclosure to a grand jury of evidence derived from a wiretap "if the disclosure of that information would be in violation of this chapter". The defendants' reliance on their claimed violation of 18 U.S.C. § 2518 (9), however, is misplaced and, therefore, § 2515 has no application here.

Nonetheless, these defendants contend that a different result is dictated by the recent case of *Gelbard* v. *United States,* 408 U.S. 41 (1972). What *Gelbard* decided was "[t]he narrow question [of] . . . whether . . . witnesses [before a grand jury] may invoke the prohibition of § 2515 [18 U.S.C.] as a defense to contempt charges brought on the basis of their refusal to obey court orders to testify". 408 U.S.C. 41 at 47. The court held that the general prohibition found in that section against disclosure of evidence derived from an interception in violation of that chapter could be asserted as a defense in that narrow factual setting. Since none of defendants here were witnesses before the grand jury, *Gelbard* has no application.

These defendants also contend that when the government initially elected to proceed by complaint, the defendants acquired a right to a preliminary hearing and, per-

force, the right to the wiretap orders and applications and that the government could not therefore deny them the right by proceeding to grand jury indictment. Rule 5 (c), Federal Rules of Criminal Procedure, 18 U.S.C., expressly provides in part that "the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination". The cases have consistently held that there is no constitutional right to a preliminary hearing and that "it is well settled law that a preliminary hearing is unnecessary when a valid indictment has been returned by the Grand Jury". *United States* v. *Smith,* 357 F.2d 318, 320 (6th Cir. 1966); *United States* v. *Luxenberg,* 374 F.2d 241, 247 (6th Cir. 1967); *Dillard* v. *Bomar,* 342 F.2d 789 (6th Cir. 1965), *cert. denied,* 382 U.S. 883 (1965).

The contention of only one defendant needs to be considered separately by Judge Feikens. Fairh Lee Riggs (Riggs) asserts that her trial here violates her right not to be twice put into jeopardy. She claims she has been tried here for the same offense for which she was convicted in the Southern District of New York. This contention is not well-founded. Riggs' New York conviction was based upon the substantive offense of possession of narcotics in New York City on September 26, 1971. In this case, she was convicted of conspiracy and through *Pinkerton*[3] of the substantive offenses charged against her in the indictment. The facts as to her activities in New York were received into evidence for the purpose of showing her involvement in the conspiracy. Nor was this the only evidence which linked Riggs to the conspiracy. She was thus not subjected to double jeopardy.

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[3] *Pinkerton* v. *United States,* 328 U.S. 640 (1946).

The court sua sponte considers the joint motion for a new trial and to vacate convictions as being filed on behalf of all defendants whether or not named in the caption of the motion.

Other contentions raised therein have been carefully reconsidered but have again been found lacking in merit for reasons previously given.

Defendants reiterate in their motion that the court's findings are not supported by the evidence. We have considered each contention separately and found in each instance referred to by defendants that there is amply evidence to support the separate findings and conclusions of this court.

Accordingly, defendants' motions for new trial and vacation of convictions are denied.

An appropriate order may be submitted.

/s/ JOHN FEIKENS
United States District Judge

/s/ PHILIP PRATT
United States District Judge

DATED: Detroit, Michigan
September 11, 1974

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 74-2338 thru 74-2353

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILLIE LEE KIRKPATRICK, et al.,
Defendants-Appellants.

ORDER

(Filed February 2, 1977)

BEFORE: CELEBREZZE and McCREE, Circuit Judges.

The petition for rehearing with suggestion for en banc consideration having come on to be heard, and appellee's response to the petition for rehearing having been received and considered, and no judge having requested a vote on the suggestion for rehearing en banc, and the motion having therefore been referred to the panel that heard the case, upon consideration, it is ORDERED that the petition be, and it hereby is, DENIED.

Entered by order of the court

/s/ JOHN P. HEHMAN
Clerk